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LIABILITY TO A BONA FIDE PURCHASER ON A STOLEN CHECK.

In *Capital City Bank v. Huffman* (date of decision not reported), the Intermediate Court of Marion County, West Virginia, handed down a decision of more than usual interest. The facts, briefly stated, were as follows: The defendant gave to his brother a number of checks on the E Bank signed by the defendant with the payee, date and amount left blank; these checks were to be filled up and used in the private business of the brother; one of the checks so signed was stolen, filled up fraudulently and cashed by the plaintiff without notice; the check being sent to the E Bank for payment, it was returned marked "No funds," and the holder sues the maker, the indorser having absconded.

This brings up fairly the question: Is a person who signs a blank check liable to a bona fide holder who takes the instrument from one who has stolen it and fraudulently filled it out? The Court says, yes. We are inclined to the belief that this decision is, to say the least, open to doubt.

We have been unable to find any case directly bearing on this subject. The various possibilities arising from the delivery of a blank instrument to an agent have practically all been in the Courts except this one. So, we can only base our conclusions on analogies. When a blank instrument is delivered to an agent (1) he may fill it out and use it as directed; or (2) he may fill in the blanks with a sum in excess of his authority; or (3) he may fill it out with the authorized sum, but be negligent in so doing so that it may be changed; or (4) it may escape from his possession while still incomplete.

It is evident that, by the rules of agency, if he fills it out as directed, the principal will be liable on the instrument as completed. And it has been repeatedly held that if he fills it out in excess of his authority the principal will be held. This is on the ground of implied authority. *Tiedman Commercial Paper,* Sect. 283; *Bigelow, Estoppel,* 495. See also *Russell v. Langstaff,* 2 Douglas 514, where Lord Mansfield said: "The indorsement on a blank note is a letter of credit for an indefinite sum."

On the next possibility the authorities are not entirely in accord. The earliest case on this subject is the English case of *Young v. Grote,* 4 Bing. 253. An agent, in filling out a check,

left blanks in such a way that the amount of the check could easily be changed. This was done and the drawer was held liable to his banker for the amount so paid out. The Court bases the decision on the express grounds of negligence. This case has been criticised by the later cases in England and in this country, and the rule as to leaving blanks in an instrument is now the other way. The fact that spaces were so left in an instrument is not evidence of negligence on the part of an indorser and he cannot be held where they are fraudulently filled up. *Scholfield v. Loudesborough* (1895), 1 Q. B. 536. In this case, the Court says that the forgery, and not the negligence, was the proximate cause of the injury, and refers to *Young v. Grote* as the "fount of bad argument." A recent case in New York reviews the authorities and reaches the conclusion that the weight of the American decisions is in favor of the later English cases, and that the leaving of a blank space is not evidence of negligence. The Court says that the only theory upon which the indorser could be held to be liable (and this would apply with equal force to a maker) is that "he is bound to assume that those to whom he delivers the paper or into whose hands it may come, will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law." *National Exchange Bank of Albany v. Lester,* 194 N. Y. 461. And see the note to this case in 21 L. R. A. (N. S.) 402, where the authorities are collected and discussed. The conclusion reached in this note is to the effect that *Bank v. Lester* states the law as supported by the weight of authority. So we can say that the general rule is that, in our third proposition, the principal cannot be held.

Coming now to the situation where the incomplete instrument has escaped from the custody of the agent and has been fraudulently filled up. This might occur either through his negligence or independent of any want of care on his part. And in the case of a check it might lead to a fraud either on the drawee bank or on a bona fide holder.

It has been held that where a blank check has been stolen and filled up by an unauthorized person, if this check is paid by the drawee bank, the drawer is liable to the bank. But this is because of the peculiar relation of banker and depositor. *Snodgrass v. Sweetzer,* 15 Ind. App. 682; *Trust Company of America v. Conklin,* 119 N. Y. Supp. 367. The bank is compelled to know the signature of its depositor, and if it is satisfied that the signa-

ture is good, it need look no further. The fact that the body of the check is in different handwriting is no notice of irregularity. See Daniel *Negotiable Instruments,* Sect. 1054a, and cases cited.

The question of the liability to a bona fide holder of an instrument of this kind seems to have been a favorite subject of discussion for a great many years, and it is surprising that it has never been settled by the Courts. In *Swan v. The North British Australasian Company,* 2 H. & C. 175, Justice Blackburn says, by way of dictum: "It is sufficient to point out that a party signing in blank, a check or other negotiable instrument, does intend that it shall be filled up and delivered to a series of holders. . . . He means the holder to be induced to take the instrument as if it had been filled up from the first." He thinks the maker would be liable on the ground of estoppel. An eminent text-writer expresses the view that the bona fide purchaser could recover from the maker. Morse on *Banks and Banking,* Vol. II, Sect. 486. The reasoning whereby he reaches this conclusion is not set forth, however.

In *Putnam v. Sullivan,* 4 Mass. 45, the defendants indorsed several blank notes and left them with their clerk, from whom the note in suit was obtained by fraud, and filled out. It reached the hands of a bona fide holder and he was allowed to recover. But in that case the clerk was guilty of negligence.

In *Baxendale v. Bennett,* 47 L. J. Q. B. 624, the defendant had signed a bill of exchange as acceptor. The name of the drawer had been left blank, and the bill was, in this condition, stolen from his desk. A drawer's name was forged and the bill came into the hands of a bona fide purchaser. The Court held that the defendant was not liable, even though he might have been negligent in leaving the note lying around in this incomplete condition, because this negligence was not the proximate cause of fraud. *Tedwick v. McKim,* 53 N. Y. 307, is to the same effect. Lord Justice Bramwell, in *Baxendale v. Bennett, supra,* expresses his opinion, by dictum, that the bona fide holder of a check that had been signed in blank and stolen could not recover.

In *Trust Co. of America v. Conklin, supra,* the Court says: "We may for the purposes of this appeal dismiss entirely the question whether the defendant would be liable to a bona fide holder for value. The question before us is entirely one con-

cerning the duties of a depositor to his bank. That a depositor owes a real duty to the bank has been frequently decided, and this duty is greater than that which the maker of an instrument owes to subsequent holders for value. A purchaser of a negotiable instrument can take it or not at his option, and usually, at least to some extent, relies on the responsibility of the last holder. A bank, however, must at its peril pay out the money deposited, if the depositor directs him to do so. . . . If the defendant is liable at all, it is because he owed the bank a duty which he violated by signing the check in blank."

Under the doctrines laid down by these decisions, it would seem that the mere act of delivering the blank check to the agent was not negligence *per se*. "There can be no negligence where there is no duty." *Bank v. Lester, supra.* According to the theory expressed in that and other cases cited, the maker need not presume that somebody will fill up these checks fraudulently or criminally. Hence, there can be no duty on him which would forbid the delivery of the checks to the agent. The theft and forgery was the proximate cause of the fraud, and he need not foresee that as against a subsequent bona fide purchaser. In the case of a check more than any other instrument, the taker relies on the credit of the last holder and assumes the risk of a forgery or other irregularity in the check. Circumstances might arise where negligence could be shown on the part of the agent in allowing the checks to escape from his custody, and in this case the holder might recover as in *Putnam v. Sullivan, supra;* but, in the absence of such circumstances, we are inclined to think that the maker would not be liable.

JURISDICTION OF COURTS IN CASES OF INJURY TO REAL PROPERTY.

A railroad car containing nitroglycerine exploded in Kentucky near the boundary line between that State and Tennessee and destroyed property in both States. A property owner in Tennessee sued for damages in the Kentucky County Circuit Court. That Court dismissed the action on the ground that it was a local action and must be brought in the jurisdiction in which the injured property is situated. The Kentucky Court of Appeals, however, reversed the County Court and held that the action was maintainable, notwithstanding the fact that the injured property was without its jurisdiction. *Smith v. Southern Ry. Company,* 123